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DEPARTMENT OF AGRICULTURE

Office of the Secretary

5 CFR Part 8301

RIN 3209-AA48

[Docket No. USDA-2019-0005]

Supplemental Standards of Ethical Conduct for Employees of the Department of Agriculture

AGENCY: Department of Agriculture, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (“USDA” or “Department”), with the concurrence of the U.S. Office of Government Ethics (OGE), is issuing this final rule for attorneys of USDA’s Office of the General Counsel (OGC). The final rule supplements the Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards) issued by OGE by revising the Supplemental Standards of Ethical Conduct for Employees of the Department of Agriculture (USDA Supplemental Ethics Regulations) concerning the outside practice of law by USDA OGC attorneys. To more fully address ethical issues unique to OGC attorneys, the final rule imposes additional restrictions on the outside practice of law, subject to certain exceptions.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Stuart Bender, Director of the Office of Ethics, U.S. Department of Agriculture, at (202) 720-2251, Stuart.Bender@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

On November 8, 2019, USDA, with OGE's concurrence, published a proposed rule in the Federal Register, 84 FR 60346, proposing to amend the USDA Supplemental Ethics Regulations as they relate to OGC attorneys who engage in the outside practice of law. The proposed rule provided a 45-day comment period, which ended on December 23, 2019. During the comment period USDA received two comments from members of the public.

Analysis of Comments Received

USDA received two sets of comments from members of the public pertaining to the proposed amendment of USDA Supplemental Ethics Regulations as they relate to OGC attorneys that engage in the outside practice of law. Neither of the comments referred specifically to the proposed revision of the USDA Supplemental Ethics Regulations as they relate to OGC attorneys who seek to engage in the outside practice of law. Instead each comment addressed unrelated general topics. The first comment recommended that USDA conduct greater environmental protection.¹ The second comment recommended that USDA more fully place an array of reports and other documents concerning the Animal Welfare Act and the Horse Protection Act in a public, searchable public database.² Neither comment addressed the substance of or suggested

¹ Comment received from Jean Publieee, November 8, 2019. For transparency, this comment was posted, in full, to the public Regulations.gov page associated with this docket.

² Comment received from Jacqui Marcella Urban, December 21, 2019. For transparency, this comment was posted, in full, to the public Regulations.gov page associated with this docket.

changes to the proposed rule. The proposed rule clarifies and strengthens the ethical requirements for attorneys in the Department's Office of the General Counsel regarding the outside practice of law. The proposed rule also encourages OGC attorneys to consider voluntary *pro bono publico* legal service, provided that such *pro bono* legal work would be compliant with the legal and ethical requirements provided in the proposed rule. Finally, the proposed rule updates and improves the procedures and standards related to OGC attorneys seeking to engage in the outside practice of law and uncompensated *pro bono publico* legal services to benefit the public, and will enhance adherence to ethics conduct related to the outside practice of law. As noted above, the two comments addressed wholly unrelated topics and did not address the substance of the proposed rule. Therefore, for the reasons detailed in the preamble of the previously issued Notice of Proposed Rulemaking (at 84 FR 60346), USDA, with the concurrence of OGE, is issuing this rule in final without changes, besides the typographical edit noted below.

During the review of the proposed rule, USDA noted an inadvertent typographical error in Section 8301.105(c)(iii)(B). Specifically, the words “exception” and “does” in that provision should read “exceptions” and “do.” The revised sentence now reads: “The exceptions to 18 U.S.C. 205 described in paragraphs (c)(ii)(B) and (c)(ii)(C) do not apply unless the employee has obtained the prior approval of a supervisory official who has authority to determine whether the employee’s proposed representation is consistent with the faithful performance of the employee’s duties.” This grammatical edit does not alter the substance or meaning of the proposed rule.

Matters of Regulatory Procedure

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (the RFA), requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations, unless the head of the agency certifies that the rules will not have a significant economic impact on a substantial number of small entities. The Secretary of Agriculture so certifies. The rule does not impose any obligations or standards of conduct for purposes of analysis under the RFA, and it therefore does not give rise to a regulatory compliance burden for small entities.

Paperwork Reduction Act

The Department has determined that this rule does not impose any new recordkeeping, reporting, or disclosure requirements on members of the public that would

be collections of information requiring approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 5 CFR Part 8301

Conflict of interests, Government employees.

Authority and Issuance

For the reasons set forth in the preamble, the Department, in concurrence with OGE, is amending 5 CFR part 8301 as follows:

PART 8301—SUPPLEMENTAL STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE

1. The authority citation for § 8301.105 is revised to read as follows:

Authority: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159 (April 12, 1989); 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547 (October 17, 1990); 3 CFR, 1990 Comp., p. 306; 5 CFR 2635.105, 2635.403, 2635.502 and 2635.803.

2. Revise § 8301.105 to read as follows:

§ 8301.105 Additional rules for attorneys in the Office of the General Counsel.

(a) *Additional rules for attorneys in the Office of the General Counsel regarding the outside practice of law.* Any attorney serving within the Office of the General Counsel shall obtain written approval, in accordance with the procedures set forth in § 8301.102(c) and the standard for approval set forth in paragraph (b) of this section, before engaging in the outside practice of law, whether compensated or not. For purposes of this section the “outside practice of law” means those activities requiring professional licensure by a state bar as an attorney and include, but are not limited to, providing legal advice to a client, drafting legal documents, and representing clients in legal negotiations or litigation.

(b) *Standard for approval.* Approval shall be granted by the agency designee unless it is determined that the outside practice of law is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635, or paragraph (c) of this section.

(c)(1) *Prohibited outside practice of law applicable to attorneys in the Office of the General Counsel.* An employee who serves as an attorney within the Office of the General Counsel shall not engage in any outside practice of law that might require the attorney to:

(i) Assert a legal position that is or appears to be in conflict with the interests of the Department of Agriculture, the client to which the attorney owes a professional responsibility; or

(ii) Interpret any statute, regulation, or rule administered or issued by the Department of Agriculture, or where a supervisory attorney determines that the outside practice of law would conflict with the employee's official duties or create the appearance of a loss of the attorney's impartiality, as prohibited by 5 CFR 2635.802; or

(iii) Act as an agent or attorney in any matter in which the U.S. government is a party or has a direct and substantial interest, as prohibited by 18 U.S.C. 205.

(2) *Exceptions.* Nothing in paragraph (c)(1) of this section prevents an attorney in the Office of the General Counsel from:

(i) Acting, with or without compensation, as an agent or attorney for, or otherwise representing, the employee's parents, spouse, child, or any other person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator,

trustee, or other personal fiduciary to the extent permitted by 18 U.S.C. 203(d) and 205(e), or from providing advice or counsel to such persons or estates; or

(ii) Acting, without compensation, as an agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings, or from providing uncompensated advice and counsel to such person to the extent permitted by 18 U.S.C. 205; or

(iii) Acting, without compensation, as an agent or attorney for, or otherwise representing any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or group's members are current employees of the United States or the District of Columbia, or their spouses or dependent children. As limited by 18 U.S.C. 205(d), this exception is not permitted for any representation with respect to a matter which involves prosecuting a claim against the United States under 18 U.S.C. 205(a)(1) or 18 U.S.C. 205(b)(1), or involves a judicial or administrative proceeding where the organization or group is a party, or involves a grant, contract, or other agreement providing for the disbursement of Federal funds to the organization or group; or

(iv) Giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

(3) *Specific approval procedures for paragraph (c)(2) of this section.*

(i) The exceptions to 18 U.S.C. 203 and 205 described in paragraph (c)(2)(i) of this section do not apply unless the employee obtained the prior approval of the

Government official responsible for the appointment of the employee to a Federal position.

(ii) The exceptions to 18 U.S.C. 205 described in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section do not apply unless the employee has obtained the prior approval of a supervisory official who has authority to determine whether the employee's proposed representation is consistent with the faithful performance of the employee's duties.

(d) *Pro Bono activity.* Subject to compliance with paragraph (c) of this section, attorneys within the Office of the General Counsel are permitted to provide outside *pro bono* legal services (without compensation other than reimbursement of expenses) to organizations or individuals through a non-profit organization, without obtaining prior written approval in accordance with the procedures set forth in § 8301.102(c).

Signed:

Stephen Alexander Vaden,

General Counsel, U.S. Department of Agriculture.

Emory A. Rounds, III,

Director, U.S. Office of Government Ethics.

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